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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 574

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, MICHIGAN PUBLIC SERVICE COMMISSION, COUNTY OF WAYNE, MICHIGAN, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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October 29, 1965

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The Commission's opposition to the grant of certiorari here is based on the claim that the instant case "turns entirely upon [its] particular facts" and hence "there is [no] conflict" (Br. in Opp., p. 12). Since this position turns upon the validity of the several assertions as to factual matters, we show below that

these assertions are wholly at war with the record and the true situation.

1. As shown in the Petition (p. 15, fn. 18), the Commission's assertion (Br. in Opp., pp. 2-3), that there is applicable here a normal and judicially approved method for the treatment of revenues from hydrocarbon extraction, is in error. The cases, in which hydrocarbon extraction revenues were credited against pipeline cost of service and on which the Commission here relies, have, in common, one extreme situation with regard to the relationship between such extraction and pipeline efficiency, namely, where it was found or assumed that *all* of such extraction was necessary or desirable for pipeline efficiency. On the other hand, in the other extreme situation, namely where *none* of the extraction affected pipeline efficiency, the Commission has pursued the opposite course and rejected the crediting approach. See, e.g., *Phillips Petroleum Co.*, 24 F.P.C. 537, 562-3, 679-83 (1960); *Panhandle Eastern Pipe Line Co.*, 25 F.P.C. 787, 798, 851-5 (1961). Since the uncontroverted facts in the instant case show that only a *very small portion* of the heavier hydrocarbons extracted during the year contribute to pipeline efficiency and the remaining overwhelming percentage is wholly superfluous thereto, none of the existing precedents are applicable here and the instant proceeding presents a case of first impression.

2. Also incorrect is the Commission's assertion (Br. in Opp., p. 7) that "Panhandle [had] failed to show that less than the entire capacity of the plants was

beneficial to pipeline operation." This is at odds with the very evidence of record cited by the Commission (R. 164) which plainly demonstrates that the maximum weekly[1] amount of desirable extraction at the Liberal plant during the coldest week of the year requires less than one-third of the total capacity of that plant.[2]

The Commission further asserts (Br. in Opp., p. 7) that Panhandle had failed to furnish "proof of variable extraction plant costs in any significant amount"[3] attributable to the superfluous extraction so that there is "no basis for assuming that the operation of the plants for purposes not beneficial to the pipeline would increase operating costs substantially above what they would be if the plants were operated solely to benefit the pipeline." Here, also, this assertion flies in the teeth of the uncontroverted and uncontrovertible fact that Panhandle's largest single item of costs with reference to the Sneed plant is the fee charged by Phillips (over $400,000 in the test year). Since this fee is a percentage of, and there-

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[1] The relevant period for determining the effect of changes in atmospheric temperatures upon the temperatures in the pipeline for condensation purposes is a week (R. 34).

[2] The maximum weekly beneficial extraction of 114,735 gallons (R. 164) is less than 30% of the average weekly extraction of about 385,556 gallons, computed by dividing the total annual volume of 20,048,918 gallons extracted at Liberal (*ibid.*) by 52 weeks.

[3] Variable costs are those which change in direct proportion to the volume of extraction, as opposed to fixed or capacity costs (such as depreciation) which do not vary with the level of plant operation.

fore necessarily directly proportional to, the gross plant revenues (R. 21, 157), the record plainly shows on its face that such cost bears a direct relationship to, and so varies directly with, the amount of hydrocarbon extraction.

Thus, there is simply no justification or warrant for the Commission's conclusory contention (Br. in Opp., p. 11) that its "findings were based principally on Panhandle's own evidence, and on testimony given by its principal engineering witness * * * there is no claim that they are not adequately supported by the record."

3. Likewise, contrary to the Commission's contention (Br. in Opp., p. 11, fn. 8), its decision herein *was* based on newly injected considerations of which Panhandle did not have notice. The Commission's contrary argument improperly fails to distinguish between the ultimate issue and the criteria for deciding that issue—two obviously separate and distinct matters. Although the ultimate question as to the proper treatment of the extraction costs and revenues had been in this proceeding from the outset, Panhandle was not aware until after the close of the record herein that the Commission intended to base its decision thereon upon considerations which were raised for the first time in the Commission's brief before the Court of Appeals in the *Panhandle* case.

The distinction between the ultimate question and the criteria for deciding that question is highlighted by the *Hill* group of cases, upon which the Petition (pp. 10-11) expressly relies and which the Commis-

sion's Brief in Opposition carefully avoids even mentioning. In these cases, also, the ultimate question had been known from the outset, yet the courts held that there had been a denial of fair hearing because the Commission had undertaken to decide the ultimate question on the basis of newly injected criteria as to which the company had not been given an opportunity to present evidence.

4. Finally, contrary to the Commission (Br. in Opp., p. 12), Panhandle did specify, to the extent, possible the nature of the evidence it would offer at the reopened hearing. Panhandle's petition to reopen not only expressly adverted to the considerations raised for the first time in the Commission's brief in the *Panhandle* case (R. 148), but stated (*ibid.*):

> "'Under the circumstances, it can hardly be disputed by the Commission that additional evidence would be necessary in order to evaluate the various methods whereby the costs of the Sneed and Liberal extraction operations could be fairly allocated. Panhandle, of course, stands ready to supply additional factual information regarding these two plants, and will, in any event, present evidence to assist the Commission in arriving at a proper solution to this vexing problem.'"

In the same vein, Panhandle's application for rehearing referred to its earlier offer "to present evidence relating to the matters * * * which had been raised for the first time by the Commission in its brief" in the *Panhandle* case, and specifically reiterated "its willingness to present such additional evidence at the reopened hearing if the instant application for rehearing is granted" (R. 179).

These offers fully assured the Commission that Panhandle would produce the evidence appropriate to the standards which the Commission had the burden to define. The Commission's action in basing its decision on newly injected considerations, while at the same time refusing to define the applicable standards, is clearly inconsistent with the *Hill* line of cases.

For the foregoing reasons as well as those set out in the Petition, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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